# EU PROSPECTUS LAW

Pierre Schammo provides a detailed analysis of EU prospectus law (and the 2010 amendments to the Prospectus Directive) and assesses the new rules governing the European Securities and Markets Authority, including the case law on the delegation of powers to regulatory agencies. In a departure from previous work on securities regulation, the focus is on EU decision-making in the securities field. He examines the EU's approach to prospectus disclosure enforcement and its implementation at Member State level, and breaks new ground on regulatory competition in the securities field by providing a 'law in context' analysis of the Prospectus Directive and its negotiations.

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# EU PROSPECTUS LAW

## New perspectives on regulatory competition in securities markets

PIERRE SCHAMMO

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# PREFACE AND ACKNOWLEDGEMENTS

It is no exaggeration to say that EU securities regulation is one of the fastest growing fields in European law. Once relatively unexceptionable, it has moved to the forefront of internal market regulation. The establishment of a European System of Financial Supervision ('ESFS') testifies to both the EU's efforts and ambitions in this field. For those writing on securities regulation, the pace with which EU securities regulation develops and evolves has become something of a challenge. But it also presents an opportunity to work in a contemporary field and to witness and experience European decision-making and its interactions with national legal systems at first hand.

I finished the manuscript of this book shortly after agreement between Union institutions had been reached on a new ESFS. The fate of the Committee of European Securities Regulators (CESR) was sealed for good and the establishment of a new European Securities and Markets Authority (ESMA) was being awaited with great expectations. The year 2010 also saw a number of noteworthy reforms taking shape in the prospectus field. These reforms also offered new opportunities to map and examine these developments, but also to revisit earlier work on regulatory competition which I had completed as part of my D.Phil. thesis in Oxford and which is reflected in the final part of this book.

In writing this book, I have been fortunate to benefit from the comments and thoughts of many people. I owe a debt of gratitude to those practitioners, EU or national officials who agreed to be interviewed despite sometimes busy working schedules and who willingly shared views and thoughts on securities regulation. I would especially like to thank David Wright who has taught me an endless amount about the EU and how it works, and Hubert Grignon Dumoulin for his insight on financial markets and his invaluable comments on various draft chapters.

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My final words of gratitude are for the persons that are closest; my family and Ayaka for her patience, love and inspiration to bring this book to completion.

I have attempted to state the law as at 28 February 2011. Any error or mistakes are my responsibility.

*Pierre Schammo*
March 2011

# ABBREVIATIONS

| | |
|---|---|
| AMF | Autorité des marchés financiers |
| CARD | Consolidated Admissions and Reporting Directive (2001/34/EC) |
| CESR | Committee of European Securities Regulators |
| CJEU | Court of Justice of the European Union |
| Coreper | Comité des représentants permanents |
| EEA | European Economic Area |
| EP | European Parliament |
| ESA | European Supervisory Authority |
| ESC | European Securities Committee |
| ESFS | European System of Financial Supervision |
| ESMA | European Securities and Markets Authority |
| ESMAReg | ESMA Regulation (EU No. 1095/2010) |
| ESRB | European Systemic Risk Board |
| FESCO | Federation of European Securities Commissions |
| FSA | Financial Services Authority |
| FSAP | Financial Services Action Plan |
| FSA-LR | Listing Rules made by the FSA |
| FSA-PR | Prospectus Rules made by the FSA |
| GAAP | Generally Accepted Accounting Principles |
| ISA | Israel Securities Authority |
| LPD | Listing Particulars Directive (80/390/EEC) (repealed) |
| MAD | Market Abuse Directive (2003/06/EC) |
| MiFID | Markets in Financial Instruments Directive (2004/39/EC) |
| PAD | Prospectus Amending Directive (2010/73/EU) |
| PD | Prospectus Directive (2003/71/EC) |
| POD | Public Offers Directive (89/298/EEC) (repealed) |
| PR | Prospectus Regulation ((EC) No 809/2004) |
| RG | Règlement Général of the AMF |
| TD | Transparency Directive (2004/109/EC) |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| UKLA | UK Listing Authority |

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**Consolidated Version of the Treaty on European Union [2010] OJ C83/1**



**Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/1**



**Council Directive (EEC) 80/390 coordinating the requirements for the drawing-up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing [1980] OJ L100/1 (repealed)**

**Directive (EC) 2004/39 of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [2004] L145/1**



**Commission Regulation (EC) 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements [2004] OJ L149/1**

**Directive (EC) 2004/109 of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC [2004] L390/38**



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**Commission Regulation (EC) No 1289/2008 of 12 December 2008 amending Commission Regulation (EC) No 809/2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards elements related to prospectuses and advertisements [2008] OJ L340/17**



**Directive (EU) 2010/73 of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market [2010] OJ L327/1**



**Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L331/84**

*United Kingdom*

**Financial Services and Markets Act (2000)**

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**FSA Listing Rules**



**FSA Enforcement Guide**



*France*

**Règlement Général**

**Code Monétaire et Financier**

# Introduction

Prospectus regulation is one of the core pillars of European securities regulation. The seeds of the prospectus regime, as we know it today, were sown by the Financial Services Action Plan and the Risk Capital Action Plan which foresaw many other measures that are nowadays pillars of the EU securities and financial markets framework.[1] In 2003, the call to modernise the 'Directives on prospectuses'[2] led to the adoption of a single directive, the Prospectus Directive ('PD'). As a Lamfalussy directive, it was given flesh by implementing legislation and, in time, by soft-law measures. Together, these measures put in place a more comprehensive regime of rules and disclosure requirements that apply to persons who wish to make a public offer or seek admission of securities to trading on a regulated market in the EU.

This book examines the prospectus disclosure regime and the institutional choices that underpin it. The PD was designed to succeed where earlier directives had failed. A new, improved, mutual recognition system – the so-called 'single passport' system – was fashioned to facilitate cross-border capital raising. A more aggressive form of 'maximum harmonisation' was supposed to bring about uniformity and, thereby, greater consolidation of rule-making competence at EU level. Since 2003, the regime and the institutional framework that governs it have developed. The directive was only recently amended in order to make it more effective and to ensure that the new European Securities and Markets Authority ('ESMA') has all the necessary powers to act in the prospectus field. The Lamfalussy framework, which deals with rulemaking, supervision and enforcement, has seen noteworthy changes as well. The Lisbon Treaty

[1] European Commission, 'Financial services: implementing the framework for financial markets: action plan' (COM(1999) 232, 11 May 1999) (the 'FSAP'), http://ec.europa.eu/internal_market/finances/docs/actionplan/index/action_en.pdf; European Commission, 'Risk capital: a key to job creation in the European Union' (April 1998) (the 'RCAP'), http://ec.europa.eu/internal_market/securities/docs/risk_capital/sec98_552_en.pdf.

[2] 'FSAP' 22. See also 'RCAP' 23.

replaced the old comitology system, which, *inter alia*, governed decision-making at Lamfalussy Level 2, by new rules on delegated and implementing acts. What is more, the worldwide financial crisis gave, after some initial hesitations, the necessary impetus to a new round of reforms which ultimately led to important institutional changes, including the establishment of a new European System of Financial Supervision ('ESFS'). ESMA replaced the Committee of European Securities Regulators ('CESR') in January 2011. In short, the EU has firmly established itself as the main actor shaping prospectus disclosure regulation while collective securities actors such as ESMA are the main force for bringing about consistency in the application of EU securities legislation.

It is against this background that the book pursues two lines of enquiry, tied together by a common interest in European decision-making in the securities field.[3] It first examines the substantive law on prospectus disclosure, including the framework that governs its creation, implementation and enforcement. Often presented as a 'maximum harmonisation' directive, the reality is more complex: first, the scope and boundaries of the maximum harmonisation regime are not necessarily obvious; second, maximum harmonisation is only one facet of a regime which uses a mixture of regulatory techniques, including a form of equivalence-based regulation; third, the lack of an autonomous enforcement apparatus[4] forces the EU to rely on the enforcement efforts of national actors and on collective securities actors such as ESMA to keep order among competent authorities. Thus, although the EU legislature is the main force shaping the regulatory regime,[5] Member State competence persists in important areas. One such area is the approval of prospectuses. One of the main messages of this book concerns this approval system. It fulfils, for better or worse, an enforcement function, but curiously, it currently also allows safeguarding decision-making powers elsewhere; for example, in the field of equivalence-based regulation.

The second theme of this book concerns regulatory competition. As a subject of study, its interest has been in sharp decline. Calls in favour of

[3] I have gained much insight on EU decision-making from Fritz Scharpf's work on policy-making (e.g., F. Scharpf, *Governing in Europe – Effective and Democratic?* (Oxford University Press, 1999); F. Scharpf, *Games Real Actors Play – Actor-Centered Institutionalism in Policy Research* (Westview Press, Boulder CO, 1997)).

[4] By 'enforcement', I mean mostly enforcement of EU rules and regulations against issuers and other market actors.

[5] For a more detailed analysis of the changes to the regulatory landscape in financial markets, see N. Moloney, *EC Securities Regulation* (Oxford University Press, 2008).

regulatory competition as an institutional arrangement in the securities markets field have mostly been silenced. The mainstream literature on securities regulation has mostly moved on, turning for inspiration and insights to new fields of interest such as law and finance, a scholarship that is more empirically grounded, but still controversial in its claims and conclusions.[6] And yet, the interest in regulatory competition is not exhausted. Indeed, the thesis of this book is that regulatory competition remains a subject of interest in the securities field. But there is a need to conceptualise it differently by engaging in a more meaningful manner with decision-making at European level. In the law and economics literature, which has dominated the study of regulatory competition and securities regulation, decision-making at EU level has mostly been outside the scope of enquiry. It has been treated as a 'black-box' and little time and effort has been invested in describing and examining 'what happens in the box, who acts and how'.[7] Deterministic assumptions about the behaviour of policy actors at EU level, with no further enquiry into the empirical reality of decision-making at this level, have left the securities literature with little useful insight. Likewise, harmonisation has been treated as an outcome or worse, a *fait accompli*, instead of being seen as a process involving actors with interests and ideas who are meant to find common agreement over sets of rules and arrangements. Law and finance scholarship has also been mostly unconcerned about the mechanics of European decision-making. Wide-scale empirical studies have admittedly shed new light on distinct legal systems and enforcement mechanisms, but here too decision-making at EU level has generally been sidestepped.[8]

Hence, there is a need for a more grounded approach which integrates European decision-making more closely into regulatory competition studies and pays due attention to the behaviour and decision-making of collective securities markets actors.[9] In short, the question is not whether regulatory competition is 'efficient', but how it affects EU decision-making

[6] See especially the work by La Porta, Lopez-de-Silanes, Shleifer and Vishny which I will discuss in Chapters 5 and 7.

[7] I borrow the phrase from C. Radaelli, 'The puzzle of regulatory competition' (2004) 24 *Journal of Public Policy* 1, 19.

[8] See Chapter 5 for details.

[9] In developing this perspective, I have, *inter alia*, benefited from Nicolaïdis's work on 'managed mutual recognition'. See e.g., K. Nicolaïdis, 'Regulatory cooperation and managed mutual recognition: elements of a strategic model' in G. Bermann, M. Herdegen and P. Lindseth (eds.), *Transatlantic Regulatory Cooperation – Legal Problems and Political Prospects* (Oxford University Press, 2000) 571.

and EU regulatory output in the prospectus field. The book attempts to work towards answers, sometimes in a descriptive manner, sometimes in a more analytical fashion, but at all times with the aim of gaining useful insights for the literature on securities regulation. In this process, old themes will be revisited (e.g., Hirschman's 'threat of exit' hypothesis)[10] and new themes will emerge, such as the discursive dimension of regulatory competition at EU level. The process of implementation of European rules, which in many respects represents the ultimate test of the effectiveness of EU law, will not be ignored either.

The various themes that the book pursues are developed in five parts and the next eleven chapters. Chapter 1 begins by introducing the different actors that participate in the creation, implementation and enforcement of EU prospectus law, and the formal institutional setting in which they act and interact. It sets the scene for the following parts that deal, in turn, with prospectus disclosure regulation, prospectus disclosure enforcement and regulatory competition. Chapter 2 is an introductory chapter on prospectus disclosure regulation. It discusses the main questions that prospectus disclosure has raised in the literature. Chapters 3 and 4 examine the two main disclosure models under the EU regime: first, an ordinary disclosure model based on 'maximum harmonisation' disclosure items; and second, a more illusive regime based on equivalence provisions. Chapter 5 is the first chapter that deals with enforcement. Its aim is to review the debate on enforcement and to present the issues that require attention. Chapter 6 continues the examination of enforcement by considering the EU's approach to prospectus disclosure enforcement and the arrangements that the EU legislature has adopted. Chapter 7 looks at the application and implementation of these arrangements at national level and, for that purpose, turns to prospectus disclosure enforcement in France and the UK. Chapter 8 introduces the part of the book on regulatory competition. It examines the debate on regulatory competition and its underpinnings. Chapter 9 defines the perspective on regulatory competition which this book seeks to explore. Chapter 10 is the empirical part of this study. In an effort to examine the propositions and suggestions of the previous chapter, it turns to the negotiations of the PD. The book ends with a conclusion in Chapter 11 which summarises earlier findings and makes a set of proposals for the future.

[10] A. Hirschman, *Exit, Voice and Loyalty – Responses to Decline in Firms, Organizations, and States* (Harvard University Press, Cambridge MA, 1970).